

1  
2  
3  
4  
5  
6 UNITED STATES DISTRICT COURT  
7 EASTERN DISTRICT OF WASHINGTON  
8

9 EDWARD SCOT BREMER,

10 Plaintiff,

11 vs.

12 CAROLYN W. COLVIN, Acting  
13 Commissioner of Social Security,

14 Defendant.

No. 2:14-CV-00407-JPH

ORDER

15 BEFORE THE COURT are cross-motions for summary judgment. ECF No.  
16 14, 18. On October 13, 2015, plaintiff filed a reply. ECF No. 19. The parties have  
17 consented to proceed before a magistrate judge. ECF No. 7. After reviewing the  
18 administrative record and the parties' briefs, the court **grants** defendant's motion  
19 for summary judgment, **ECF No. 18**.

## **JURISDICTION**

Bremer applied for disability insurance benefits (DIB) on September 19, 2013, alleging onset beginning August 15, 2006 (Tr. 148-54). Benefits were denied initially and on reconsideration (Tr. 90-92, 98-99). ALJ James W. Sherry held a hearing March 19, 2014. Bremer and a vocational expert testified (Tr. 38-70). On July 11, 2014, the ALJ issued an unfavorable decision (Tr. 19-32). The Appeals Council denied review on October 28, 2014 (Tr. 1-3). The matter is now before the Court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on December 19, 2014. ECF No. 1, 4.

## **STATEMENT OF FACTS**

The facts have been presented in the administrative hearing transcript, the ALJ's decision and the parties' briefs. They are briefly summarized here and as necessary to explain the court's decision.

Bremer was 32 years old on the date he was last insured and 34 at the hearing. He graduated from high school and attended college for two years but did not earn a degree. He served in the Army reserve and the Army, including a tour in Iraq. He was medically discharged from the Army in 2006. Plaintiff lives with his former spouse and two children, ages nine and twelve at the time of the hearing. In January 2007 he had left knee surgery. It helped at first but has become unstable again. Walking more than one half mile is painful. He can stand 45 minutes to an

1 hour and sit for an hour and a half. He experiences back and right sciatic nerve  
2 pain. Lifting is limited to twenty pounds. Plaintiff testified he has panic attacks  
3 about once a month that last ten to fifteen minutes. He suffers crying spells,  
4 isolation, depression and anxiety; medications do not “help very much.” The  
5 Veterans’ Administration found plaintiff has an eighty percent disability rating.  
6 (Tr. 40-42, 45-52, 54-56).

### 7 SEQUENTIAL EVALUATION PROCESS

8 The Social Security Act (the Act) defines disability as the “inability to  
9 engage in any substantial gainful activity by reason of any medically determinable  
10 physical or mental impairment which can be expected to result in death or which  
11 has lasted or can be expected to last for a continuous period of not less than twelve  
12 months.” 42 U.S.C. §§ 423 (d)(1)(A), 1382c(a)(3)(A). The Act also provides that a  
13 plaintiff shall be determined to be under a disability only if any impairments are of  
14 such severity that a plaintiff is not only unable to do previous work but cannot,  
15 considering plaintiff’s age, education and work experiences, engage in any other  
16 substantial gainful work which exists in the national economy. 42 U.S.C. §§ 423  
17 (d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both  
18 medical and vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
(9<sup>th</sup> Cir. 2001).

19 The Commissioner has established a five-step sequential evaluation process

1 or determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step  
2 one determines if the person is engaged in substantial gainful activities. If so,  
3 benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If not, the  
4 decision maker proceeds to step two, which determines whether plaintiff has a  
5 medically severe impairment or combination of impairments. 20 C.F.R. §§  
6 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If plaintiff does not have a severe impairment  
7 or combination of impairments, the disability claim is denied.

8 If the impairment is severe, the evaluation proceeds to the third step, which  
9 compares plaintiff's impairment with a number of listed impairments  
10 acknowledged by the Commissioner to be so severe as to preclude substantial  
11 gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii); 20 C.F.R.  
12 §404 Subpt. P App. 1. If the impairment meets or equals one of the listed  
13 impairments, plaintiff is conclusively presumed to be disabled. If the impairment is  
14 not one conclusively presumed to be disabling, the evaluation proceeds to the  
15 fourth step, which determines whether the impairment prevents plaintiff from  
16 performing work which was performed in the past. If a plaintiff is able to perform  
17 previous work, that plaintiff is deemed not disabled. 20 C.F.R. §§  
18 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, plaintiff's residual capacity  
19 (RFC) is considered. If plaintiff cannot perform past relevant work, the fifth and  
final step in the process determines whether plaintiff is able to perform other work

1 in the national economy in view of plaintiff's residual functional capacity, age,  
2 education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
3 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

4 The initial burden of proof rests upon plaintiff to establish a *prima facie* case  
5 of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir.  
6 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
7 met once plaintiff establishes that a physical or mental impairment prevents the  
8 performance of previous work. The burden then shifts, at step five, to the  
9 Commissioner to show that (1) plaintiff can perform other substantial gainful  
10 activity and (2) a "significant number of jobs exist in the national economy" which  
11 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup> Cir. 1984).

## 12 STANDARD OF REVIEW

13 Congress has provided a limited scope of judicial review of a  
14 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold the  
15 Commissioner's decision, made through an ALJ, when the determination is not  
16 based on legal error and is supported by substantial evidence. *See Jones v. Heckler*,  
17 760 F.2d 993, 995 (9<sup>th</sup> Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir.  
18 1999). "The [Commissioner's] determination that a plaintiff is not disabled will be  
19 upheld if the findings of fact are supported by substantial evidence." *Delgado v.*  
*Heckler*, 722 F.2d 570, 572 (9<sup>th</sup> Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial

1 evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,  
2 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*,  
3 888 F.2d 599, 601-02 (9<sup>th</sup> Cir. 1989). Substantial evidence “means such evidence  
4 as a reasonable mind might accept as adequate to support a conclusion.”  
5 *Richardson v. Perales*, 402 U.S. 389, 401 (1971)(citations omitted). “[S]uch  
6 inferences and conclusions as the [Commissioner] may reasonably draw from the  
7 evidence” will also be upheld. *Mark v. Celebreeze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir.  
8 1965). On review, the Court considers the record as a whole, not just the evidence  
9 supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20,  
10 22 (9<sup>th</sup> Cir. 1989) (*quoting Kornock v. Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980).

11 It is the role of the trier of fact, not this Court, to resolve conflicts in  
12 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational  
13 interpretation, the Court may not substitute its judgment for that of the  
14 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup>  
15 Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be  
16 set aside if the proper legal standards were not applied in weighing the evidence  
17 and making the decision. *Browner v. Secretary of Health and Human Services*, 839  
18 F.2d 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial evidence to support the  
19 administrative findings, or if there is conflicting evidence that will support a

1 finding of either disability or nondisability, the finding of the Commissioner is  
2 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir. 1987).

### 3 **ALJ'S FINDINGS**

4 ALJ Sherry found Bremer was insured through December 31, 2011 (Tr. 22).  
5 At step one, the ALJ found Bremer worked after onset but not at substantial gainful  
6 activities levels (Tr. 22). At steps two and three, he found plaintiff suffers from  
7 lumbar degenerative disc disease (DDD) with radicular symptoms; degenerative  
8 joint disease of both knees, status post acromioclavicular (ACL) reconstruction;  
9 plantar fasciitis, status post bilateral stress fracture of the foot and post-traumatic  
10 stress disorder (PTSD) or anxiety disorder with panic attacks, impairments that are  
11 severe but do not meet or medically equal a listed impairment (Tr. 22-25). The  
12 ALJ found plaintiff is able to perform a range of light work (Tr. 25). At step four,  
13 relying on a vocational expert's testimony, the ALJ found Bremer is unable to  
14 perform his past relevant work (Tr. 30). At step five, again relying on the VE, the  
15 ALJ found plaintiff can perform other jobs such as printed circuit board assembler,  
16 charge account clerk and final assembler (Tr. 30-31). The ALJ concluded Bremer  
was not disabled from onset through his last insured date (Tr. 32).

### 17 **ISSUES**

18 Bremer alleges the ALJ erred when he assessed credibility and the weighed  
19 the medical evidence. ECF No. 14 at 14. The Commissioner asks the court to

1 affirm, alleging the ALJ applied the correct legal standards and the decision is  
2 supported by substantial evidence. ECF No. 18 at 18.

### 3 DISCUSSION

#### 4 A. Credibility

5 Bremer challenges the ALJ's credibility assessment. ECF No. 14 at 14-18.

6 To aid in weighing the conflicting medical evidence, the ALJ evaluated  
7 Bremer's credibility. Credibility determinations bear on evaluations of medical  
8 evidence when an ALJ is presented with conflicting medical opinions or  
9 inconsistency between a claimant's subjective complaints and diagnosed condition.  
10 *See Webb v. Barnhart*, 433 F.3d 683, 688 (9<sup>th</sup> Cir. 2005). It is the province of the  
11 ALJ to make credibility determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039  
12 (9<sup>th</sup> Cir. 1995). However, the ALJ's findings must be supported by specific cogent  
13 reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9<sup>th</sup> Cir. 1990). Absent  
14 affirmative evidence of malingering, the ALJ's reason for rejecting the claimant's  
15 testimony must be "clear and convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9<sup>th</sup>  
16 Cir. 1995). This has been, and continues to be, the correct standard in this circuit.  
17 *Garrison v. Colvin*, 759 F.3d 995, 1014-15 (9<sup>th</sup> Cir. 2014).

18 ALJ Sherry's reasons are clear and convincing.

19 He notes Bremer's statements have been inconsistent (Tr. 28). Bremer  
testified he applied for a few jobs after his military discharge. He was not hired and

1 thinks this was because he was honest about his disabilities with prospective  
2 employers (Tr. 45). At other times Bremer said he thought he could not get a job  
3 because he has a felony conviction from when he was a teenager (Tr. 28, 258,  
4 358). He has described the felony conviction as “minor offense” (Tr. 460).

5 The ALJ points out plaintiff has inconsistently reported his work history (Tr.  
6 28). He testified that after onset he worked temporarily for Labor Ready (Tr. 43-  
7 45, 56). The record also shows he also worked twenty hours a week for nearly two  
8 years beginning in 2009 as a veteran’s representative while attending college full  
9 time (Tr. 170). The Commissioner is correct that failing to mention this in his  
10 testimony or to the agency when he applied for benefits does not necessarily  
11 establish the ability to work full time, but the ALJ was entitled to consider it as  
12 evidence of a lack of candor. ECF No. 18 at 14.

13 Bremer testified the medications prescribed for anxiety and depression  
14 (prozac and paxil) cause “bad headaches” and do not help very much (Tr. 51, 58-  
15 59). In July 2010 he admitted recently started taking prozac regularly; prior to that  
16 he was noncompliant. In September 2010 plaintiff said he had no side effects from  
17 the antidepressants and felt it was helping (Tr. 318, 321, 595). In January 2011 he  
18 told a provider prozac helped in the past, he had little response so far and no side  
19 effects (Tr. 303). In September 2011 he wanted to go back on prozac. He “tolerated  
it fine” in the past but admitted he did not take it consistently for long (Tr. 287).

1 In March 2013 Plaintiff told the VA his two children lived with him and he  
2 hoped to reunite with his former spouse. The children were ages 8 and eleven. He  
3 said he attends school activities, plays ball with his children, helps with homework,  
4 coaches his daughter's basketball team, cooks, cleans, does laundry and shops. In  
5 October 2013 he told a provider he was working construction "to make ends  
6 meet." As noted, plaintiff attended college for two years after onset, beginning in  
7 2009, and worked twenty hours a week for almost two years as a veteran's  
8 representative. His GPA has been 2.5, 3.5 and 4.0. He is one class shy of earning  
9 his AA degree (Tr. 226, 238-39, 315, 328-30, 457, 459, 510).

10 Contrary to his testimony, the record shows plaintiff said he could walk two  
11 miles (in 2011) and play basketball with his children (in 2013) (Tr. 226, 239, 309).  
12 In November 2013 he "was not yet ready" to consider neurosurgery for his back  
13 problems (Tr. 444).

14 Additional evidence supports the ALJ's determination. Plaintiff told the VA  
15 he had not smoked marijuana since he smoked it once in high school. In 2007 he  
16 told them he smoked it twice a month (Tr. 370, 459).

17 The ALJ's reasons are clear, convincing and supported by the record. *Burch*  
18 *v. Barnhart*, 400 F.3d 676, 680 (9<sup>th</sup> Cir. 2005)(lack of medical evidence is properly  
19 considered as long as it is not the sole basis for discounting pain testimony, daily  
activities are properly considered); *Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9<sup>th</sup>

1 Cir. 2002)(proper factors include inconsistencies in claimant's statements and  
2 inconsistencies between statements and conduct); *Fair v. Bowen*, 885 F.2d 597,  
3 603 (9<sup>th</sup> Cir. 1989)(unexplained or inadequately explained noncompliance with  
4 medical treatment is properly considered).

5 *B. Weighing opinion evidence*

6 Bremer alleges the ALJ should have given more credit to the opinions of Jan  
7 Lewis, Ph.D., and to the V.A.'s disability determination. ECF No. 14 at 18-20,  
8 referring to Tr. 28-30. The Commissioner answers that the ALJ's reasons for  
9 partially rejecting these contradicted opinions are specific and legitimate. ECF No.  
10 18 at 15-18.

11 Agency reviewing psychologist Dr. Lewis opined Bremer is mildly limited  
12 in the ability to perform activities of daily living and moderately limited in social  
13 functioning and in the ability to maintain concentration, persistence and pace (Tr.  
14 86). Dr. Lewis opined Bremer would work best if away from the public and would  
15 be capable of basic, work-related interactions with co-workers (Tr. 86-87). She  
16 opined Bremer is capable of simple, routine tasks and some complex tasks (Tr. 86).

17 As the Commissioner correctly points out, the ALJ accepted these findings  
18 as consistent with the record as a whole and with Bremer's demonstrated  
19 functioning. ECF No. 18 at 16, citing Tr. 28. Plaintiff alleges the ALJ rejected Dr.  
Lewis's opinion, but this is not entirely accurate. The ALJ simply gave less weight

1 to a portion of Dr. Lewis's opinion: plaintiff's concentration, persistence and pace  
2 are moderately limited and would wane occasionally (Tr. 28-29, citing Tr. 86). The  
3 ALJ is correct that this assessment is undercut by plaintiff's demonstrated ability to  
4 attend college full-time and work part-time (as well as function at times as a single  
5 parent), because all of these tasks require concentration, persistence and  
6 appropriate pace. The ALJ may properly reject a physician's contradicted opinion  
7 that is inconsistent with the record as a whole. *Orn v. Astrue*, 495 F.3d 625, 631  
8 (9<sup>th</sup> Cir. 2007)(citation omitted).

9 The ALJ similarly gave some weight to the VA's disability determination.  
10 He notes the record contains several references to the disability rating (Tr. 29,  
11 referring to, for example, Ex. 4F/39, 4F/58-64). The VA's rated disabilities  
12 include PTSD (50%), flat foot (10%), degenerative arthritis of the spine (10%),  
13 sciatic nerve neuritis (10%), paralysis of sciatic nerve (10%), hiatal hernia (10%)  
14 and traumatic arthritis (10%), for a total service connected disability of 80% (Tr.  
15 29).

16 An ALJ "must ordinarily give great weight to a VA determination of  
17 disability." *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9<sup>th</sup> Cir. 2002). Because  
18 the VA and the SSA programs are not identical, the ALJ may give less weight to  
19 the VA disability rating by giving persuasive, specific and valid reasons for doing  
so that are supported by the record. *McCartey*, 298 F.3d at 1076, citing *Chambliss*

1 *v. Massanari*, 269 F.3d 520, 552 (5<sup>th</sup> Cir. 2001)(per curiam).

2 The ALJ did not give great weight to the VA determination because the total  
3 number meant little without the underlying rationale and the basis for the  
4 determination. In addition, the ALJ notes the disability rating does not provide a  
5 function-by-function analysis of plaintiff's abilities, as required by the Social  
6 Security Administration's rules and regulations; for this reason, the rating itself  
7 (without the underlying rationale and basis for the determination) is not probative  
8 of plaintiff's functional abilities (Tr. 29).

9 Significantly, ALJ Sherry made several attempts to obtain the missing  
10 information (the rationale and the bases underlying the disability rating) but was  
11 unable to because plaintiff repeatedly failed to cooperate. *See* Tr. 147, 194-96, 198,  
12 201. This is significant because both programs require claimants to present  
13 extensive medical documentation in support of their claims. *McCartey*, 298 F.3d at  
14 1076 (cited statutory references omitted). By failing to provide this documentation,  
15 the ALJ was unable to properly evaluate the basis for the VA's disability  
16 determination.

16 The ALJ's reason is persuasive, specific and valid. It is supported by  
17 substantial evidence.

18 The ALJ generally credited the VA clinicians who assessed plaintiff's global  
19 functioning (GAF) as between 52 and 58, indicating moderate symptoms or

1 functional difficulty (Tr. 30). See Tr. 235, 308 (2011 and 2013); Tr. 328, 331, 335,  
2 338, 341, 343, 358, 373, 380 (2007); Tr. 462 (2013); Tr. 557 (2011); Tr. 692, 718  
3 (2013)[note some of these records are repeated at Tr. 792, 812, 815, 820, 823, 826,  
4 828, 843, 858, 866]. The ALJ gave these opinions some weight, noting the scores  
5 are generally consistent with the record as a whole with respect to plaintiff's  
6 demonstrated social functioning and ability to maintain concentration, persistence  
7 and pace (Tr. 30).

8 It is the ALJ's province to resolve ambiguity in the record, such as  
9 conflicting medical opinions. Although Bremer alleges the ALJ should have  
10 weighed the evidence differently, the ALJ is responsible for reviewing the  
11 evidence and resolving conflicts or ambiguities in testimony. *Magallanes v.*  
12 *Bowen*, 881 F.2d 747, 751 (9<sup>th</sup> Cir. 1989).

13 The ALJ's reasons for rejecting more dire limitations are specific, legitimate  
14 and supported by substantial evidence. The ALJ assessed an RFC that is consistent  
15 with the record as a whole. There was no harmful error.

### 16 CONCLUSION

17 After review the Court finds the ALJ's decision is supported by substantial  
18 evidence and free of harmful error.

### 19 IT IS ORDERED:

1. Defendant's motion for summary judgment, **ECF No. 18**, is **granted**.

The District Executive is directed to file this Order, provide copies to counsel, enter judgment in favor of defendant, and **CLOSE** the file.

DATED this 17th day of December, 2015.

JAMES P. HUTTON

UNITED STATES MAGISTRATE JUDGE